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No. 96-1092

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRYAN H. CRAWFORD, et al.

Petitioners,

vs.

DANIEL E. LUNGREN, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE VILLAGE VOICE, LA WEEKLY, OC WEEKLY, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, AND RECORDING INDUSTRY ASSOCIATION OF AMERICA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT

The Village Voice, LA Weekly, OC Weekly, American Booksellers Foundation for Free Expression, International Periodical Distributors Association, National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, and Recording Industry Association of America, Inc., submit this joint amicus brief urging reversal of the decision below.[1] This brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

INTEREST OF THE *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute and sell books, magazines, sound recordings, and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining, some of which are sold in newsracks. *Amici*, providers of mainstream speech in a variety of forums and media, are concerned by the fact that, under the holding of the court below, the requirement that the state government demonstrate that its restriction on First Amendment rights promotes a compelling interest or constitutes the least restrictive means to promote that interest has been substantially diminished. They are also greatly concerned by the statement in the opinion, which has no support in the precedents of this Court, that the availability of "similar" First Amendment-protected materials in libraries and other alternative sources justifies or mitigates restrictions on First Amendment rights.

Amici believe that the diminished standards applied by the court below are incorrect and, if sustained, would permit legislatures to enact statutes which could erode the scope of

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[1] A description of the *amici* is attached as Appendix A.

presently accepted First Amendment rights. Similarly, the assumption by the majority below that governmentally-imposed impediments to access to constitutionally-protected materials do not run afoul of the First Amendment as long as similar materials are available elsewhere to persons desiring them also is incorrect and also endangers First Amendment rights.

The resolution of these issues will determine the scope of legislation affecting the First Amendment rights of *amici* in the future.

SUMMARY OF ARGUMENT

Through its precedents, this Court has carefully crafted a protective edifice for the First Amendment. One of the cornerstones of that edifice is that content-based regulation of protected speech must withstand strict scrutiny.

The court below, by shifting the burden to the plaintiffs as to whether the regulation is narrowly tailored to serve a compelling interest, undermines the requirement of strict scrutiny and minimizes the protections developed by this Court's decisions.

Similarly, it has been settled law that "one is not to have the exercise of his liberty of expression in appropriate places abridged" by the fact that such expression may be elsewhere available. *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The court below ruled to the contrary and went further, justifying the restriction at issue on the basis that "similar" material was available elsewhere. This is not a valid basis for such a position. Indeed, it flies in the face of First Amendment jurisprudence.

ARGUMENT

I

THE COURT OF APPEALS IMPERMISSIBLY REQUIRED THE PLAINTIFFS TO DISPROVE THAT SECTION 313.1(c)(2) IS NARROWLY TAILORED TO SERVE A COMPELLING INTEREST, THEREBY SHIFTING THE STATE'S BURDEN TO THE PLAINTIFFS

The court of appeals acknowledged that section 313.1(c)(2), which restricts the sale of certain sexually frank materials from newsracks, is a content-based regulation on protected speech, and therefore is presumptively unconstitutional. (App. 11). *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Nevertheless, the court shifted the state's burden of proof to the plaintiffs, in effect requiring the plaintiffs to disprove the constitutionality of the statute. For both elements of strict scrutiny analysis—compelling state interest and means narrowly tailored — the court was satisfied to rely on its own "common sense" as the basis for its holdings, rather than objective evidence. (App. 12-14). Plaintiffs were then challenged to rebut the court's presumption of constitutionality.

With respect to compelling interest, the court of appeals concluded the state's undisputed goal is "to shield minors from the influence of adult-oriented literature by limiting minors' access to the publications." (App. 11). This laudable goal, in the abstract, satisfied the court that the state had a compelling interest to enact the content-based restriction, despite the fact the state had produced no evidence that California newsracks in fact could harm or have harmed minors. But a laudable goal, without more, does not establish a compelling interest:

> That the Government's asserted interests are important in the abstract does not mean, however, that the [legislation] will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 114 S. Ct. 2445, 2470 (1994) (citations omitted) (reviewing content-neutral statute with intermediate scrutiny).

The court of appeals' short-circuited approach endows the "compelling harm" of exposing minors to adult materials with talismanic effect. Under the court of appeals' logic, by simply invoking this phrase, the state could always meet its burden of proof without offering any evidence the alleged harm actually exists.[2] *See Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434, 1454-55 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (quoted in

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[2] At oral argument, the court of appeals did address the state's failure to offer any evidence that genuine harm existed, inquiring what facts supported the state's theory of harm. (App. 63-65). Counsel for the state argued it need not demonstrate that minors actually purchased adult materials from newsracks because there was inherent harm in the existence

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Turner, 114 S. Ct. at 2470). This approach bypasses the careful balancing of interests the decisions of this court require when a state seeks to impose a significant burden on free speech.

As to whether the statute is narrowly tailored, the court of appeals explicitly shifted the state's burden of proof to the plaintiffs. After recognizing a complete "absence of findings or specific evidence" in the record that section 313.1(c)(2) is narrowly tailored, the Ninth Circuit imposed a burden on the plaintiffs to "imagine and allude to other means" of achieving the state's goal. (App. 13). If the plaintiffs offered such alternatives, the court concluded, then "the state has the ultimate burden of showing that the means in question are not effective." (App. 13). Consistent with imposing the burden on the plaintiffs, the court cited its conclusion that the plaintiffs did not posit any "less burdensome means ... which would still effectuate the goals for which the statute was designed," as evidence the statute was narrowly tailored. (App. 16. *See also* App. 19 ("Given [plaintiffs'] interest in suggesting other possibilities and the fact that we cannot imagine others ourselves, we are satisfied that the statute is narrowly tailored ....")).

The decisions of this Court are clear that it is the state's burden throughout to demonstrate the means are narrowly tailored. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Boos v. Barry*, 485 U.S. 312, 322 (1988). That burden does not give rise to a complementary burden on the plaintiffs.

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of these materials in the newsracks. (App. 64, 67-68). This response is not relevant. No matter what harm the state articulates, it must demonstrate the harm in fact exists. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 114 S. Ct. 2445, 2471 (1994).

The court of appeals was reluctant — and quite reasonably so — to require the legislature to engage in any factual findings as a prerequisite for constitutionality. (App. 12-13). Such a requirement could overstep the bounds of judicial review. At the same time it might unreasonably limit a court's power to consider facts outside of those posited by the legislature. *See Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law").

Although the legislature may have enacted section 313.1(c)(2) in a factual vacuum, the court of appeals is not empowered to review the laws in the same vacuum, "in the absence of findings or specific evidence." (App. 12). The decision below cites several cases for the proposition that the state need not provide any evidence of harm when "common sense" militates in favor of the state. But the critical difference between the present case and those cited by the court of appeals is that the other courts relied on factual findings from some source, not simply their own notions of potential harms in the world. *Compare City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52 (1986) (city's reliance on studies of similar problems in another case was sufficient "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); *Sable*, 492 U.S. at 129 (courts can consider facts outside of those found by legislature). In this case, to satisfy the state's burden of proof, the court could have looked to outside sources as evidence of harm, but merely looking inward, as it did, is not sufficient.

Judge Tashima's concurring opinion illustrates the danger of the approach taken by the court of appeals. Emboldened by the court's "truly instinctive and experiential" approach of substituting self-reflection for review of evidence, Judge Tashima endorses the "finding" that the statute is narrowly tailored

"despite the absence of any evidence in the record to support" it. (App. 21). If this method of judicial review, which Judge Tashima acknowledged is "contrary to the teaching of all conventional wisdom," becomes the standard, courts will have license "to stretch the limits of the plausible, to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." *Denver Area Telecommunications Consortium, Inc. v. Federal Communications Commission*, ___ U.S. ___, 116 S.Ct. 2374, 2394 (1996). Such an extension has not been and should not be countenanced by this Court. *Id.*

II

THE PRECEDENTS OF THIS COURT DO NOT PERMIT A RESTRICTION ON THE DISSEMINATION OF FIRST AMENDMENT PROTECTED SPEECH TO BE JUSTIFIED BY THE FACT THAT "SIMILAR" MATERIAL IS AVAILABLE AT ALTERNATIVE PLACES OR THROUGH ALTERNATIVE MEDIA

For over 50 years, it has been the established jurisprudence of this Court that "one is not to have the exercise of his liberty of expression in appropriate places abridged by the plea that it may be expressed in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). For example, this precept has been applied to establish that a ban on the distribution of leaflets and pamphlets on city streets is not permitted because "persons [are] free to distribute printed matter in other public places," *id.*; that a ban on live entertainment in general and nude dancing in particular is not permitted because "they are amply available in close-by areas" outside the jurisdiction, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77, 78 (1981); and that a ban on unsolicited

mailing of contraceptive information is not permitted because it does not bar other channels of communication. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 69, n.18 (1983).

Amici represent various media, some of which extensively use newsracks as a medium of distribution and many of which do not. But they unanimously assert the importance to each of them as First Amendment speakers not to be subject to content-based or media-based restrictions on their choice of the manner, means and location of distributing their protected expression.

The First Amendment is not satisfied by laws that limit the ways protected expression may be distributed, so that it is difficult for prospective recipients of such expression to receive it. Thus, the First Amendment prohibits even content-neutral restrictions that unduly constrict the opportunities for free expression. *Ladue v. Gilleo*, 512 U.S. 43, 48 n.13 (1994). This Court has often referred to the "robust" exchange of views safeguarded by the First Amendment. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 514 (1991).

The suggestion of the Ninth Circuit that the First Amendment would be satisfied if the restricted materials were available in local libraries is simply incorrect under the First Amendment decisions of this Court. Libraries are valuable, perhaps indispensable, parties in the making available the broadest range of First Amendment-protected materials to the population at large. A state may not, however, justify a restriction on the right to distribute First Amendment-protected material based on such availability. *See, e.g., Schneider v. New Jersey, supra; Schad v. Borough of Mount Ephraim, supra; Bolger v. Youngs Drug Products Corp., supra.* A creator or publisher cannot be required to distribute through one or more types specified outlets; nor can a person be required to find expressive material only in such locations.

In any event, the evidence showed and, indeed, the trial court found that defendants' publications were not generally available elsewhere, and apparently it would be difficult to find alternative sources of distribution. Based on a factual finding that *other* "non-obscene sexually explicit material . . . is freely available in libraries, newsstands, music stores and pay-per-view television" (no. 10, App. 28), the Ninth Circuit justified the restriction on the basis that "adult-oriented publications *of a similar ilk* are readily available to adults in libraries and other easily accessed locations." (App. 18-19).

This Court has never authorized a restriction on one group of First Amendment speakers based on the availability of similar expression by others. The reasoning of the Ninth Circuit would justify a restriction on the distribution of the novels of John Updike on the ground that the works of other contemporary novelists are generally available. Such a result is nonsense and a perversion of the meaning of the First Amendment. The rights granted by the First Amendment are granted to each speaker, and are personal to him, her or it. The limiting of any one speaker is a diminution of the whole and violates the First Amendment.

CONCLUSION

The opinion below, both as to the burden of proof on the issue of whether a First Amendment-restrictive regulation is narrowly tailored to serve a compelling interest and as to whether the availability of "similar" materials at alternative places justifies such a regulation, flies in the face of the jurisprudence of this Court and its progeny in other circuits. *Amici* therefore respectfully urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: February 12, 1997

Respectfully submitted,

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APPENDIX A: THE *AMICI*

The Village Voice, the grandfather of alternative weekly newspapers, is the oldest and largest circulation weekly newspaper in the United States, with current distribution exceeding approximately 230,000, of which approximately 63,000 are distributed without charge in newsracks in New York, New York. Since 1955, *The Village Voice* has provided political and investigative reporting, as well as coverage and criticism of the arts, by writers such as Norman Mailer, Ezra Pound, Henry Miller, Nat Hentoff and Allen Ginsburg. It is the recipient of two Pulitzer Prizes, the George Polk Award and the Front Page Award, among others.

LA Weekly is a Los Angeles based alternative newspaper featuring news reporting and coverage of the arts. *LA Weekly* has current circulation of approximately 200,000, of which approximately 10,000 copies are distributed in newsracks in California.

OC Weekly shares common ownership with, and similar format to, *The Village Voice* and *LA Weekly*. *OC Weekly* has a circulation of approximately 52,500, of which approximately 5,000 are distributed in newsracks in Orange County, California.

The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging

for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of Recording Merchandisers is an international trade association whose more than 1,000 members represent recorded entertainment retailing, wholesaling, distributing and manufacturing.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Publishers Marketing Association (PMA) is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Recording Industry Association of America, Inc. (RIAA) is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.